UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DISH NETWORK, LLC	)	
	)	
and	)	Case No. 27-CA-131084
	)	
DAVID RABB, an Individual.	)	

REPLY BRIEF IN SUPPORT OF RESPONDENT DISH NETWORK LLC'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION

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I. INTRODUCTION

Respondent DISH Network, LLC ("DISH") files this Reply Brief in Support of Respondent DISH Network LLC's Exceptions to Administrative Law Judge Decision ("Reply Brief") to address several items raised in the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision ("GC Brief"). Most notably, the reason for the Charging Party's discharge has never been evaluated. Both the ALJ and the GC have created their own reason that fits their theory of the case. The ALJ ignored record evidence showing that the Charging Party's conduct was a type of call avoidance for which others have been discharged and that he received a final warning.

The GC Brief does not address all of DISH's exceptions. Rather, the GC synthesizes the exceptions into the four questions presented. The four questions presented in DISH's brief serve only as a road map for all DISH's exceptions. There are far more than four analytical flaws behind the ALJ's opinion. Not all the flaws are re-hashed here.

A. *Wright Line* requires more than an inference of animus, it requires causation.

As DISH pointed out in its Brief, to meet its initial burden, the GC must prove that the challenged adverse action was motivated by animus. In *Wright Line*, the Board noted the GC must make "a prima facie showing sufficient to support the inference that protected conduct **was a 'motivating factor' in the employer's decision**. 251 NLRB 1083, 1089, (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) (emphasis added). The ALJ failed to

identify any union animus connected to the adverse employment action at issue. Instead, he manufactured "animus" from an unrelated warning Rabb received for distribution of post-it notes in the workplace with a lawyer's contact information on them, which had no bearing on DISH's decision to discharge him.

The GC argues that protected conduct need not be a factor "in the employer's decision" under "the *Wright Line* standard, which only [*sic*] requires that the General Counsel make 'a prima facie showing sufficient to support the inference that the protected conduct was a 'motivating factor' in the employer's decision.'" (GC Brief pp. 15-16).[1]

The GC is incorrect. If the burden of persuasion did not shift to the employer after the *prima facie* phase of *Wright Line*, then the GC's argument would make sense. In that case, the Respondent would have an opportunity to rebut the inference and make it fall away. However, the GC asserts liability is established once the GC meets its *prima facie* burden. (GC's Brief to ALJ p. 33). Liability requires more than an inference; it requires causation. If protected activity is not a factor in the employer's decision, then there is no causation. The GC's assertion that liability can be established without causation is wrong. *See Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 6 n.1 (2014) (Miscimorra, concurring) and cases cited therein ("...generalized antiunion animus does not satisfy the initial *Wright Line* burden absent evidence that the challenged adverse action was motivated by antiunion animus").

It is well-established that the Board's task "is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect" their employment. *Wright Line*, 251 NLRB at 1089.

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[1] The GC Brief does not have numbered pages. For ease of reference, DISH considered the Introduction Section as page 4.

It only makes sense that there be a causal connection between the protected activity and the adverse employment action. Otherwise, a mere inference of animus could result in liability.

There is no causal connection between Rabb's discharge and his protected activity. Indeed, his protected activity had been ongoing and even assisted by Evans and other managers. On two occasions, Evans supported saving Rabb's job despite his ongoing protected activity. Because of this, the ALJ and GC hang onto the shred of evidence they have, a prior discipline unrelated to Rabb's discharge for papering the desk of employees.

The GC attempts to overcome this flaw by arguing "Respondent, of course, glosses over the fact that the preceding two pages of the ALJ's decision was [*sic*] replete with analysis of the unlawful nature of the solicitation policy and the discipline that flowed from a breach of that policy." (GC Brief p. 16).

The "analysis" cited by the GC, however, consists of conclusory statements about solicitation policies, in general, and contained no connection to this case. If the ALJ had applied the law to the facts at issue, including the nature of DISH's business, its sales floor, and the fact that Rabb was disciplined for **distribution** (not solicitation), the "analysis" might have lived-up to the label created by the GC.

B. The ALJ ignored the true reason for Rabb's discharge.

1. Rabb's conduct was not garden variety silent hold.

According to the GC Brief: "Respondent asserted that Rabb's conduct on March 4 of placing a customer on silent hold to use the restroom was egregious, insubordinate and intolerable. However, Rabb credibly testified that employees had engaged in this very conduct for nearly the entire time he was employed by Respondent." (GC Brief p. 9). This is not an accurate representation of the record. Rabb was unable to testify as to how often he or anyone else engaged in the conduct for which he was disciplined (i.e. placing a caller on silent hold at

the end of a call to use the bathroom and snapping at a supervisor when confronted). (R. 154-155). Rabb's admission that he used silent hold 1,500 times cannot be extrapolated to mean that he engaged "in this very conduct" for which he was terminated "nearly the entire time he was employed" as the GC pretends.

Conspicuously absent from the ALJ decision or the GC Brief is any mention of the following record evidence:

- Raymond Best was afraid he would be fired if he used silent hold to take a bathroom break and "was scared to death to do it." (R. 191).
- Welle testified he rarely used silent hold for bathroom breaks because he does not "abuse it." (R. 240, 242).
- Both Hughes and Parris testified it was unacceptable to use silent hold the way Rabb did. (R. 463, 475).
- DISH discharged another ISA in 2013 for abuse of silent hold as a reason. (R. 374; Ex. 10). In that instance, DISH noted, "By placing customers on mute, [employee] takes additional break time that is not measured by his break or AUX metrics above. These unauthorized breaks via silent hold negatively impact the customer experience by placing them on unnecessary hold." This was the exact reason for Rabb's discharge and captures DISH's view that using silent hold in the place of break time is improper.
- Rabb provided no credible testimony that he used silent hold as a substitute for breaks. Indeed, of the alleged 1,500 times Rabb used silent hold, he could not provide a percentage of times he used silent hold for the bathroom. (R. 154-155).

The ALJ and GC simply ignore these facts because they do fit into their simplistic analysis -- this was common activity so the discharge must have been for concerted activity. In fact, the record is devoid of evidence that Rabb's conduct was common.

2. The ALJ and GC are not permitted to be a super personnel department.

Where there is contradicted testimony from ISA's that using silent hold as a substitute for break is improper, the ALJ and GC try to overcome it by pointing to those ISA's break usage in an attempt to justify Rabb's conduct. DISH has already explained the difference between abuse

of silent hold and going over on break time. The conduct differs because one is dishonest and one is honest. It is DISH's business judgment as to how seriously to treat these two types of conduct.

The GC Brief points out that Emily Evans testified that excessive BREAK AUX usage could qualify as call avoidance. (GC Brief p. 23). This testimony, however, was what **could** qualify as call avoidance. She did not testify that exceeding BREAK AUX by seven minutes **is call avoidance**. Here is a prime example of the GC attempting to act as a super-personnel department. Despite having never set foot in DISH's call center, the GC would have the Board take his word for what conduct is equivalent in the call center. The GC is not qualified or permitted to make this argument.

DISH presented evidence of employees it discharged for conduct it found similar to, if not less egregious than, Rabb's conduct. DISH assiduously explained why those employees' conduct is similar to Rabb's conduct. The GC and ALJ, by contrast, mistakenly attempt to compare abusing silent hold to exceeding BREAK AUX by a few minutes. DISH has explained why this analysis, which attempts to compare honest and dishonest conduct, makes no sense. The GC and the ALJ are discredited in this regard. They are in no position to judge what DISH may consider "sufficiently similar" conduct to Rabb's misconduct.

3. Rabb's prior discipline for "milking a call" is more similar to his conduct than going over break time.

Interestingly, the ALJ and GC ignore Rabb's previous discipline resulting in a final warning for an incident a year before his discharge when he told another ISA that he was "milking a call". (R. 78, 171-172; Ex. 10). The record shows DISH was going to discharge Rabb, but backed it off to a final warning. DISH considered this conduct to be "sufficiently similar" to Rabb's conduct a year later. Any reasonable person who would compare the incident

of "milking the call" to lying to a customer and placing the customer on silent hold to use the bathroom, as more similar than an ISA exceeding break by a few minutes. But the ALJ and GC ignore this previous discipline for almost the exact conduct. One can only surmise that this record evidence is ignored because it does not fit into the tidy theory they have built of the case.

4. Appelhans had warned Rabb about the proper procedure for using the restroom just days before his discharge.

This outcome-based analysis is even more apparent when one considers that Coach Barry Appelhans warned Rabb just a few days prior to his discharge about the proper AUX code to use the restroom. (R. 119, 148). The GC makes much of Appelhans being a Section 2(11) supervisor. But then totally ignores that Appelhans had just warned Rabb that the correct procedure for using the restroom is to go into BREAK AUX. Rabb blatantly ignored this instruction just a few days later. The GC cannot have it both ways -- if Appelhans is a Section 2(11) supervisor, then Rabb ignored a direct instruction from him in an attempt to save his break time. Again, this incident is ignored by the ALJ and GC because it does not fit their theory of the case.

In the end, the GC's brief does nothing to overcome the biggest flaw in the ALJ decision -- that the stated reason for Rabb's discharge was use of silent hold as a tool for call avoidance. The record does not reveal that the use of silent hold for break time or as a tool for call avoidance is commonplace.

C. The ALJ failed to analyze the solicitation policy in light of DISH's retail sales floor.

The GC states in its brief that "The ALJ did not opine on the Respondent's defense that the Solicitation policy was lawful in the particular circumstances of this case, because no evidence was presented at trial that Respondent's call center was a retail sales floor, which would entitle Respondent to the presumption that it could prohibit solicitation on the sales floor."

(GC Brief p. 25). The GC cannot, however, speculate as to the reasons the ALJ failed to analyze DISH's argument under *J.C. Penny Company, Inc.*, 266 NLRB 1223 (1983).

The GC's attempt to distinguish the sales floor at DISH from a physical retail sales floor is without merit. In an age where the Board has been quick to realize the realities of the modern workplace, there is no fair reason to limit *J.C. Penny* to old-fashioned sales floors. The reasoning in both instances is the same: distribution interferes with customer service.

In the long line of cases that allow for broader non-solicitation policies on retail sales floors, the basis of the decision is that solicitation can interfere with customer interactions. The record evidence shows that the sales floor at DISH is in a former shopping mall with ISAs taking inbound sales calls from potential customers. (R. 295). The call center is a hectic place, receiving 2,500 sales calls a day. (R. 162, 291). In fact, the call center is "crazy and chaotic" with employees constantly on calls. (R. 299).

Based on the record evidence, customers are calling into a busy call center to determine whether they are going to purchase DISH products. This is no different than a customer entering a retail store and deciding whether they want to buy a product. In both instances, solicitation has the potential to disrupt that customer interaction. The ALJ completely ignored this argument, despite these record facts and the arguments presented by DISH. The GC's assertion that the ALJ was somehow privileged to ignore the argument because the DISH sales floor is not a traditional retail space is without merit.

II. CONCLUSION

The ALJ and GC have gone to great lengths to find that DISH violated the Act. The ALJ's decision ignores evidence, such as Rabb's discipline history and other employees' testimony about Rabb's conduct. When the wheat is separated from the chaff, we are left with an employee who had received a final warning the year before for similar conduct, who ignored a

coach's specific instruction on the proper procedure, and then acted in an inappropriate manner when caught. Instead of analyzing these facts, the ALJ manufactured his own reasons for discharge that would make his analysis easy. For this and all the reasons described in DISH's brief in support of exception, and DISH respectfully requests that the Board grant its exceptions, vacate the ALJ decision, and dismiss the complaint.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief in Support of Respondent DISH Network LLC's Exceptions to Administrative Law Judge Decision was filed via NLRB E-File and served to the following via electronic mail and E-File, as noted below, on this 4th day of June, 2015.

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